No. 42231-0-II
(consolidated with No. 41811-8-II)

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

GARY SMITH

Appellant/Respondent,

v.

CLARK PUBLIC UTILITIES,
a municipal corporation of the State of Washington;

Appellant, and

CLARK COUNTY, by and through the DEPARTMENT OF CLARK COUNTY PUBLIC WORKS, a political subdivision of the State of Washington,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Richard Melnick)

APPELLANT CLARK PUBLIC UTILITIES' OPENING BRIEF

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I. INTRODUCTION

Clark Public Utilities (CPU), a ratepayer-funded municipal corporation, provides electric and water service to homes and businesses in Clark County, Washington. Northwest Structural Moving (NSM), a private entity, notified CPU of its intent to move two structures over county and state roads in Clark County. NSM repeatedly informed CPU that it had "measured the entire route" and its loads were "below any utility wire heights." Clark County granted permits for the moves. During the second move, Gary Smith, an NSM employee, was riding on the roof of a house being towed on a state highway when he contacted an energized power line and was injured. Smith sued CPU and Clark County alleging negligence. Both defendants moved for summary judgment. The trial court granted Clark County's motion, but denied CPU's.

The trial court erred in denying summary judgment to CPU. CPU owed no duty to disconnect its lines or ensure compliance with regulations that establish minimum clearances from energized lines. If CPU owed any duty, it was to the public in general rather than any particular person. Under the public duty doctrine, such a duty is not actionable. Even if CPU owed Smith a duty individually, as a matter of law there was no breach because CPU did everything it was asked to and was not legally obligated to verify NSM's representations. This Court should reverse and remand with directions to enter summary judgment in CPU's favor.

The trial court also erred in granting summary judgment to Clark County. Where the County had actual knowledge of NSM's failure to

submit all the required information with its permit application, Smith presented facts demonstrating genuine issues of material fact regarding applicability of the failure-to-enforce exception to the public duty doctrine and proximate causation. This Court should reverse the summary judgment in favor of the County and remand for further proceedings.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL

A. Assignments of Error.[1]

1. CPU assigns error to the denial of its summary judgment motion, as reflected in the trial court's order denying summary judgment, CP 993-95, and its memorandum opinion on summary judgment, CP 984-89.

2. CPU assigns error to the trial court's summary judgment in favor of Clark County, CP 690-95, and its memorandum opinion on summary judgment, CP 656-59.

B. Issues on Appeal.

For its appeal from the denial of its summary judgment motion, CPU states the following issues:

1. If CPU owed a duty with respect to its review of NSM's planned structure move, was that duty owed to the public at large rather than any particular individual? (Assignment of error no. 1.)

2. Does the public duty doctrine apply where Smith targeted his allegations of negligence at CPU's governmental function of reviewing a planned structure move for public safety purposes, rather than any proprietary function, such as protecting facilities for the benefit of utility customers? (Assignment of error no. 1.)

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[1] CPU does not acquiesce in any findings of fact or conclusions of law made by the trial court. Findings and conclusions are superfluous in the context of an order on summary judgment, and assignments of error are not required. *Wash. Optometric Ass'n v. Pierce County, City of Tacoma*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991).

3. May Smith invoke the special relationship exception to the public duty doctrine despite the lack of any evidence of direct contact between him and CPU or of any express assurance by CPU? (Assignment of error no. 1.)

4. Did CPU owe Smith a duty to disconnect its lines or ensure compliance with applicable jobsite safety regulations? (Assignment of error no. 1.)

5. Did the trial court err in denying summary judgment to CPU where CPU owed no legal duty to Smith? (Assignment of error no. 1.)

6. Did the trial court err in denying summary judgment to CPU where, even if CPU owed Smith a legal duty, there was no breach? (Assignment of error no. 1.)

For its appeal from the summary judgment in favor of Clark County, CPU incorporates by reference the issues stated by Appellant Smith in his Opening Brief at 2-3. (Assignment of error no. 2.)

III. STATEMENT OF THE CASE

A permit is required to move a structure from one place to another using a Clark County right of way or a state highway. Clark County Code (CCC) § 10.06A.060 (CP 806); RCW 46.44.090; WAC 468-38-360. As a prerequisite to obtaining a permit from Clark County, the applicant must "bring proof" of having made the "necessary arrangements" with utility providers:

> Arrangements for the disconnection and connection of any utilities or other facilities in the right-of-way shall be the responsibility of the permittee and any expenses in connection therewith shall be paid by the permittee. The permittee and/or permit applicant shall bring proof acceptable to the Director of Public Works or his designee that demonstrates that the necessary arrangements with the utilities or other facilities have been made.

CCC § 10.06A.070(c)(11) (CP 811-12). Although Clark County must require a permit applicant to "bring proof" of having made any "necessary arrangements" with CPU, CPU itself lacks authority to approve or disapprove a proposed structure move. *See id.*; CP 819. Although CPU accommodates requests relating to structure moves from time to time, no statute, regulation, or ordinance requires CPU to review, evaluate, supervise, or otherwise address a structure move.

NSM has been in the structure-moving business since 1993, and its founder and president, Keith Settle, has worked in the industry since 1986. CP 737. NSM moves approximately 15-20 structures annually. CP 737.

In February 2005, CPU received a facsimile from NSM's vice president, Christy Settle, regarding a plan to move two houses via an identical route, near Camas, Washington. CP 823. Ms. Settle represented that the maximum loaded height of each house was 17 feet, 2 inches. CP 823. She further represented that the peak of each house was "below any utility wire heights." CP 823. Ms. Settle represented that the only potential conflict with CPU facilities involved four "guy stubs" or guy poles:[2]

> We have been contracted to move two houses. Both houses are going to the same location and ***each house is below any utility wire heights***. The only problem we foresee is when we get to NE Stauffer Road where we have 4 utility poles directly across from 4 guy stubs which decreases our width below the 28 feet plus that we need to maneuver the house

[2] A guy stub or guy pole is the ground anchor for one or more cables attached to certain utility poles to offset tension from the transmission lines and maintain the pole's upright position. *See* CYCLOPEDIA OF APPLIED ELEC. 61 (1914).

> through the designated route. Our request is for Clark Public Utilities to drop the 4 guy stubs prior to the move date.

CP 823 (emphasis added).[3] NSM did not request that CPU disconnect any facilities. CP 823. NSM did not provide CPU a complete map of the planned route for the move. CP 831, 933.

Bob Hinkel, a CPU design engineer, called Ms. Settle and recommended that NSM utilize a CPU "standby" to monitor the move and address any conflicts with CPU facilities. CP 830-31. This service was available for all structure moves at the mover's expense. CP 831. In addition, Mr. Hinkel requested a complete map of the planned route. CP 831. Ms. Settle informed Mr. Hinkel "that [she] and her husband ***had driven out the route*** and there were ***no other conflicts with any [of] CPU's facilities*** except the previously mentioned [guy] poles." CP 830 (emphasis added); *see also* CP 822. Mr. Hinkel testified, "[S]he informed me that...they do this all the time, they move houses all the time, and...they're professionals at this, this is what they do." CP 830. He further testified: "The gist of the whole thing was being treated like, ['T]rust me, sonny, I know what I'm doing, ...you don't have to worry about it, we're okay[']." CP 834.

The following week, on March 5, 2005, Ms. Settle called Mr. Hinkel and notified him that NSM planned to remove the eaves from the two houses, making them narrower, such that only three guy poles needed

[3] In its Opinion on Summary Judgment, the trial court incorrectly found that CPU determined it would be necessary to relocate the guy poles. CP 985.

to be moved rather than four. CP 822. Ms. Settle confirmed this via facsimile, where she reiterated: "We also ***measured the entire route*** for utility wire moves and ***both houses are below any utility wires*** so this will not be an issue for us." CP 825 (emphasis added).

Mr. Hinkel went out and staked new locations for the three guy poles and checked the known portion of the route for any obvious clearance concerns. CP 822, 832. When checking clearances, Mr. Hinkel will "stop and measure anything that looks like it might be questionable." CP 832. He confirmed that "everything was within the distance that was necessary for the heights they gave us." CP 832. He would have made note of any wires below 18 feet, but found none. CP 832. Mr. Hinkel created a work order to move the three guy poles and invoiced NSM for the cost, $1,811.51. CP 822, 926. After CPU received payment for the guy-pole relocation work, Mr. Hinkel requested that CPU's construction and maintenance superintendent, Don LiDrazzah, schedule the work to be completed before April 3, 2005. CP 822, 837, 880, 924, 936.

On March 17, 2005, NSM submitted applications to the Clark County Public Works Department for the two house moves. CP 752-771. In the applications, signed by Christy Settle, NSM represented to the County that the maximum loaded height of each house was 17 feet, 6 inches. CP 753, 759. NSM provided the County a complete route description and map. CP 765-70. With each application, NSM submitted a form required by Clark County, entitled "House Movers Check List." CP 755, 761. The form stated that the permit applicant must contact

applicable utility providers to make arrangements. CP 755, 761. Under the heading for each utility provider (CPU, cable, phone, etc.), NSM wrote: "***Below utility wire height.***" CP 755, 761 (emphasis added). Based on this representation, Clark County did not require NSM to provide proof that it had notified or made any arrangements with utility providers, nor did the County contact CPU regarding NSM's applications. CP 740, 750, 787-88, 840, 842.

Clark County issued permits to move the two houses. CP 787-88. The permit required that NSM use escort vehicles, and that the front escort "have [a] height pole at all times." CP 787-88. Because the route for the structure moves included a state highway, NSM also applied for and received permits from the Washington State Department of Transportation (WSDOT). *See* CP 654-55. Like CPU and the County, WSDOT accepted and relied upon NSM's representations regarding the loaded height of each house. *See* CP 654.

CPU completed the guy-pole relocation work on April 1, 2005. CP 837. NSM moved the first house on April 3 without incident. CP 742. The second move took place on April 10. During the second move (and possibly during the first), NSM put two employees, including Smith, on the roof "to assist in getting the low, sagging, non-hazardous wires on[to] the slider board that was installed on the peak of the roof." CP 745. NSM had instructed Smith to "stay low on the eave of the roof." CP 746. But when the house was on State Route 500 at SE 244th, Smith went to the peak of the roof and stood up. CP 746. The back of his head or neck

contacted a primary transmission line, and Smith received an electric shock, resulting in injury.[4] CP 846.

After the incident, NSM continued moving the house. When CPU employee Gary Boe arrived to investigate, the house was no longer at the intersection where Smith was injured. CP 892-93. Mr. Boe noted that the flatbed trailer upon which the house sat was equipped with hydraulic jacks that allowed it to be raised and lowered. CPU 890, 892-93. Mr. Boe measured the loaded height of the house and found it to be 18 feet, 11 inches—21 inches higher than NSM had represented to CPU. CP 847. When Mr. Boe took his measurement, the front hydraulic jack was raised approximately 4 to 6 inches. CP 847. Mr. Boe also measured the height of CPU's lines at the accident site. CP 847. Mr. Boe found that the energized primary line was 23 feet, 7 inches, above the road centerline (where the peak of the house would have been), and the neutral line was 18 feet, 5 inches, above the centerline. CP 847. For safety and to accommodate truck traffic, CPU places its energized primary lines at least eighteen feet above roads. CP 830, 832.

Based on NSM's representation that loaded height of the house was 17 feet, 2 inches, the house should have been nearly 6 1/2 feet below the energized primary line. CP 847. Based on the height of 18 feet, 11

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[4] Although Smith's Opening Brief states that he was "electrocuted," *see, e.g.*, pages 1 & 3, Smith was not killed and remains alive today. The word "electrocute" does not encompass a non-fatal electric shock. "Electrocute" is defined as "1: to put to death as a legal punishment by causing a fatally large electric current to pass through the body... 2: to kill by electric shock[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY 732 (2002).

inches, as measured by Mr. Boe on the raised trailer, the house was still more than 4 1/2 feet below the energized primary line. CP 847. CPU generally sought to maintain 6 to 24 inches of clearance between its facilities and a structure being moved. CP 873, 906, 918.

Smith sued CPU and Clark County. CP 1-5. Smith alleged that CPU negligently evaluated the proposed structure move and failed to ensure compliance with "WISHA, OSHA and/or NESC minimum clearance requirements." CP 3. Smith alleged that Clark County was negligent in issuing permits for the structure moves, including by violating its own procedures and failing to make "appropriate safety arrangements" with CPU. CP 3-4.

Clark County moved for summary judgment based on lack of a duty. CP 82-92. Smith and CPU opposed the County's motion. CP 415-28, 429-47. The trial court dismissed the County on the basis that the County lacked jurisdiction over the state-owned road where the incident occurred, and on the alternate basis of the public duty doctrine. CP 656-69. The trial court entered a partial final judgment under CR 54(b). CP 690-95. Both Smith and CPU timely appealed from the judgment. CP 696-704, 710-718.

Subsequently, CPU moved for summary judgment based on lack of a duty or, in the alternative, that there was no breach. CP 848-56. Smith opposed CPU's motion. CP 947-70. The trial court denied CPU's motion but entered a stipulated order certifying the denial of summary judgment for immediate appeal under RAP 2.3(b)(4). CP CP 984-89, 990-92, 993-

95. A commissioner of this Court granted CPU's unopposed motion for discretionary review.

IV. AUTHORITY AND ARGUMENT

A. The Standard of Review Is *De Novo*.

This Court reviews the grant or denial of summary judgment *de novo*. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 148 P.3d 574 (2006); *Kaplan v. N.W. Mut. Life Ins. Co.*, 115 Wn. App. 791, 800, 765 P.3d 16 (2003). Likewise, whether a duty exists in the context of a negligence claim is a question of law reviewed *de novo*. *Sheikh*, 156 Wn.2d at 448. A party is entitled to summary judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. CPU's Duty, If Any, Was to the Public In General, Which under the Public Duty Doctrine Is Not Actionable.

If CPU owed any duty with respect to NSM's structure move, it was to the public in general rather than any particular person. Under the public duty doctrine, such a duty is not actionable.

1. Purpose and Nature of the Public Duty Doctrine.

"Tort liability in negligence cases is predicated upon a duty owed to a particular plaintiff." *Sunde v. Tollett*, 2 Wn. App. 640, 643, 469 P.2d 212 (1970), citing W. PROSSER, TORTS §§ 30, 53 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 4 (1965). A duty to the public at large, rather than to individual members of the public, is not actionable.

Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This principle is expressed as the public duty doctrine. *Id.*

The principle underlying the public duty doctrine applies "[w]hether the defendant is a governmental entity or a private person." *Taylor*, 111 Wn.2d at 163. Indeed, it has been applied in cases involving private parties. *See, e.g., Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 807, 43 P.3d 526 (2002) (professional engineers); *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 943-44, 29 P.3d 50 (2001) (private corporations). A seminal public duty decision by Judge Benjamin Cardozo for the New York Court of Appeals involved a private water supplier. *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), cited in *Campbell v. Bellevue*, 85 Wn. 2d 1, 10-11, 530 P.2d 234 (1975). Nevertheless, the public duty doctrine is typically applied to determine whether the government owed a duty to the plaintiff under a statute, regulation, or ordinance. *See Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

The public duty doctrine does not confer immunity, but rather is used in determining whether the defendant owed a duty to a "nebulous public" or a particular individual. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006), quoting *Taylor*, 111 Wn.2d at 166; *see also Robb v. City of Seattle*, 159 Wn. App. 133, 144-45, 245 P.2d 242, *rev. granted*, 171 Wn.2d 1024 (2011). Generally, no duty is owed to a particular individual unless one of four exceptions applies: (1) legislative intent, (2) failure to enforce, (3) rescue doctrine, and (4) special

relationship. *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006). Each has distinct requirements.

In *Osborn*, where the Supreme Court most recently discussed the public duty doctrine, the court observed that the doctrine "simply reminds us that a public entity—like any other defendant—is liable only if it has a statutory or common law duty of care. And its 'exceptions' indicate when a statutory or common law duty exists." 157 Wn.2d at 27-28. In this manner, the doctrine ensures that public entities "are not to become liable for damages to a greater extent than if they were a private person or corporation." *Robb*, 159 Wn. App. at 146. The doctrine reflects the policy that "legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." *Taylor*, 111 Wn.2d at 170.

2. The Public Duty Doctrine Applies Because CPU's Duty, If Any, Was to the Public in General Rather than Any Particular Individual.

The public duty doctrine applies where the activity the plaintiff alleges was negligently performed was governmental or quasi-governmental, rather than proprietary. *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006), citing *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.3d 1257 (1987). A function is not deemed proprietary merely because a private enterprise could or does perform the function. *See, e.g., Moore v. Wayman*, 85 Wn. App. 710, 715-16, 934 P.2d 707 (1997) (building inspections are a governmental function even though a statute authorizes local governments to use private contractors);

Champagne v. Spokane Humane Soc'y, 47 Wn. App. 887, 892, 737 P.2d 1279 (1987) (animal control is a governmental function even if performed by a private contractor). "The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity." *Okeson v. City of Seattle* ("*Okeson I*"), 150 Wn.2d 540, 550, 78 P.3d 1279 (2003).

In the case of a public entity that performs both governmental and proprietary functions, as a utility often does, applicability of the public duty doctrine depends on the particular function the plaintiff alleges was negligently performed. *Stiefel*, 132 Wn. App. at 530. For instance, operation of a municipal water system is generally a proprietary function. *Id.* But, in *Stiefel*, where the plaintiff alleged certain municipalities were negligent in failing to maintain adequate water supply to a fire hydrant, the public duty doctrine applied because fire protection is a governmental function, as it is for the safety of the general public. *Id.* The plaintiff's allegations were targeted at the governmental function of supplying water for fire protection purposes, rather than the proprietary function of supplying water for domestic use. *Id.*

As demonstrated in *Stiefel*, public utilities and other entities often perform overlapping proprietary and governmental functions. The Supreme Court has repeatedly recognized such distinctions. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 882, 194 P.3d 977 (2008) (operation of municipal water system is proprietary; installation and

maintenance of fire hydrants is governmental); *Okeson I*, 150 Wn.2d at 550-551 (operation of electric utility is proprietary; installation and maintenance of streetlights is governmental); *Goggin v. City of Seattle*, 48 Wn.2d 894, 897, 297 P.2d 602 (1956) (construction and maintenance of streets is proprietary; supervision and control of streets is governmental).

Recognizing their dual capacities, the Supreme Court has adopted a specific test applicable to electric utilities: activity by an electric utility is presumed *governmental* and will not be characterized as proprietary *unless* "(a) it is part of the production and sale of electricity and (b) it is for the 'comfort and use' of individual customers paying only for their own usage, not for general public use." *Okeson v. City of Seattle* ("*Okeson II*"), 159 Wn.2d 436, 449, 150 P.3d 556 (2007), quoting *Okeson I*, 150 Wn.2d at 550.

Review of a proposed activity for public safety and welfare purposes is a core governmental function. *See Dorsch v. City of Tacoma*, 92 Wn. App. 131, 960 P.2d 489 (1998) (permit review); *Moore*, 85 Wn. App. at 716 (building inspection), citing *Taylor*, 111 Wn.2d 159. In *Moore*, this Court observed that building code inspections "are not part of a state business venture; they are an example of the governmental function of ensuring compliance with state law." 85 Wn. App. at 716. *Dorsch* is particularly analogous.

In *Dorsch*, the city of Tacoma granted permits for a billboard and installed its electrical connection. 92 Wn. App. at 133. The applicant's employee was electrocuted while preparing to descend from the billboard

using an aluminum ladder, which came into contact with one of Tacoma's transmission lines. *Id.* Affirming summary judgment for Tacoma under the public duty doctrine, this Court rejected the plaintiff's argument that Tacoma engaged in a proprietary function in granting permits for the billboard, reasoning, "[it] acts more in a regulatory manner by initially determining whether the proposed use may be accomplished safely." *Id.* at 136.

CPU lacks permitting authority over a structure move and is not required by any statute, regulation, or ordinance to review, evaluate, supervise, or otherwise address a structure move. But to the extent it reviews whether a planned structure move conflicts with its facilities, CPU acts in a regulatory manner. Any potential conflict with CPU's facilities is a public safety concern due to the possibility of an energized line endangering the public. For instance, a fallen or severed line could injure drivers, pedestrians, residents, or children at play, as well as a house-moving crew. Mr. Hinkel testified in deposition that CPU has multiple concerns, including "general safety of the public." CP 830. CPU's duty, if any, in the context of reviewing a proposed structure move, is to the public in general rather than any particular individual.

Without specific analysis, the trial court concluded that "CPU's acts were a combination of governmental and proprietary but were more proprietary than governmental." CP 988. But the critical issue is not the predominant character of the activity, but rather the target of the plaintiff's allegations. *Stiefel*, 132 Wn. App. at 530. Smith does not allege that CPU was negligent in performing any proprietary function, such as protecting its

facilities for the benefit of utility customers. He alleges it was negligent in failing to protect him from electric shock. Reviewing a proposed structure move for public safety purposes is not part of CPU's "business venture," but rather can only be regulatory in nature. Any duty in this context is owed to the public in general rather than any particular individual. *Dorsch*, 92 Wn. App. at 136. The public duty doctrine applies.

3. No Exception to the Public Duty Doctrine Applies.

The four exceptions to the public duty doctrine "generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed." *Osborn*, 157 Wn.2d at 28, quoting *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999). "The question whether an exception to the public duty doctrine applies is...another way of asking whether the State had a duty to the plaintiff." *Osborn*, 157 Wn.2d at 28, quoting *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

In the trial court, Smith asserted no exception, arguing only that the public duty doctrine did not apply because CPU performed a proprietary function. CP 960-69. Yet the trial court ruled *sua sponte* that, even if CPU were correct that the public duty doctrine would otherwise apply, Smith was entitled to invoke the "special relationship" exception.

The special relationship exception applies only where the plaintiff establishes (1) direct contact between a public official and the plaintiff, (2) an express assurance by the public official to the plaintiff, and (3) justifiable reliance on such assurance by the plaintiff. *U.S. Oil Trading,*

LLC v. State, 159 Wn. App. 357, 365, 249 P.3d 630, *rev. denied*, 171 Wn.2d 1025 (2011), citing *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). As a matter of law, these requirements are not met.[5]

First, there is no evidence of any direct contact between CPU and Smith. No court has held that contact between the government and a *third party* (such as the plaintiff's employer) is sufficient to meet this requirement.

Second, even assuming contact between CPU and NSM could satisfy the direct contact requirement, there is no evidence of an express assurance. The requirement of an express assurance is strictly enforced: "The plaintiff must seek an express assurance and the government must unequivocally give that assurance." *Babcock*, 144 Wn.2d at 789.[6] A special relationship does not arise based on an inherent assurance. *Id.*,

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[5] The nonmoving party must come forward with specific facts showing that a genuine issue of fact exists for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 234, 770 P.2d 182 (1989), citing CR 56(e).

[6] *See, e.g., Cummins v. Lewis County*, 156 Wn.2d 844, 855-56, 133 P.3d 458 (2006) (holding exception inapplicable absent evidence of unequivocal promise by 911 operator to dispatch medical assistance; assurance "inherent" in 911 system did not trigger duty); *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 789-91, 30 P.3d 1261 (2001) (holding firefighter's statement that she would protect plaintiffs' property was not express assurance giving rise to a duty where statement was unsolicited and firefighter promised no specific action); *U.S. Oil Trading, LLC v. State*, 159 Wn. App. 357, 366, 249 P.3d 630 (2011) (holding exception inapplicable where plaintiff conceded it received no express assurance); *Moore v. Wayman*, 85 Wn. App. 710, 720-21, 934 P.2d 707 (1997) (holding inspection approval was not express assurance that house complied with all codes); *Smith v. State*, 59 Wn. App. 808, 813, 802 P.2d 133 (1991) (holding exception inapplicable where plaintiff conceded lack of direct contact with defendant agency).

citing *Taylor*, 111 Wn.2d at 167, and *Honcoop*, 111 Wn.2d at 192-93. There is no evidence that NSM sought any assurance from CPU. Moreover, there is no evidence that CPU made any express assurance to NSM.

CPU was entitled to accept at face value the information provided by NSM that it had "measured the entire route" and its load was "below any utility wire heights." CP 823, 825. "A governmental authority is entitled to rely upon the statements made by a permit applicant and has no duty to verify them." *Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988). Such a duty would be unmanageable and would make local governments an insurer against private negligence. *See Taylor*, 111 Wn.2d at 168-71.[7]

Finally, because there was no express assurance, the requirement of justifiable reliance cannot be met. The special relationship exception is inapplicable, and does not save Smith's claims against CPU from dismissal under the public duty doctrine. This Court should reverse and remand with directions to enter summary judgment in CPU's favor.

In the alternative, should this Court decline to reverse the denial of summary judgment, it should nevertheless rule as a matter of law that the

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[7] As Judge Melnick observed in his order granting summary judgment to Clark County in this case:

> Such an obligation [to investigate or independently confirm information provided by a permit applicant] does not exist. To require the County to verify the infraction is unmanageable, impractical and overly burdensome.

CP 658-59.

special relationship exception does not apply because there is no genuine issue of material fact regarding any of the elements of that exception.

C. Regardless of the Public Duty Doctrine, CPU Owed No Duty to Smith Because Ensuring Compliance with Jobsite Safety Regulations Requiring Minimum Clearance from Energized Lines Was Strictly NSM's Obligation.

CPU was entitled to summary judgment based on lack of a duty even if the public duty doctrine were inapplicable. The essential elements of a negligence claim are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate causation between the breach and the injury. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). The threshold determination of whether a duty exists is a question of law, the answer to which depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Snyder v. Med. Svc. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

An electric utility's duty is to place its lines where workers and members of the public are not likely to come into contact with them. *Briggs v. PacifiCorp*, 120 Wn. App. 319, 325, 85 P.3d 369 (2004). Smith does not allege that CPU was negligent in installing or maintaining its lines or that there were any physical defects in its equipment. He alleges that CPU, having received notice of NSM's planned structure move, had a duty to prevent his injury by ensuring compliance with safety regulations establishing minimum clearances from energized lines.

Under the Clark County Code, NSM as the permit applicant was responsible to arrange for the disconnection and connection of utilities if required. CCC § 10.06A.070(c)(11) ("Arrangements for the disconnection and connection of any utilities or other facilities in the right-of-way ***shall be the responsibility of the permittee***[.]" (Emphasis added.)) (CP 811). NSM did not request that CPU disconnect any facilities, but allowed Smith to work in such proximity to energized lines that he inadvertently came into contact with one. When a contractor must work near an electric power circuit, the duty to prevent contact lies with the contractor and its employees. *Briggs*, 120 Wn. App. at 326. A regulation promulgated by the Department of Labor and Industries under the Washington Industrial Safety and Health Act (WISHA) requires *employers* to ensure minimum clearance between workers and any energized electric power circuit:

> No ***employer*** shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

WAC 296-155-428(1)(a) (emphasis added).[8] There is no dispute that NSM violated this regulation.[9] The question is whether CPU owed Smith

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[8] *See also* WAC 296-155-428(1)(e), which addresses minimum clearances from equipment or materials:

> No work shall be performed, no material shall be piled, stored or otherwise handled, no scaffolding, commercial signs, or structures shall be erected or dismantled, nor any tools, machinery or equipment operated within the specified minimum distances from any energized high voltage electrical conductor capable of energizing the material or equipment; except where the electrical distribution and transmission lines have been de-energized and

a duty to ensure NSM's compliance with this or any other safety regulation or code. It did not.

The duty to ensure compliance with safety regulations generally lies with each worker's employer. RCW 49.17.060(2) ("Each employer...[s]hall comply with the rules, regulations, and orders promulgated under this chapter."). A third party owes a duty to another's employee only where the third party retains control and supervisory authority over the jobsite. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002) (holding that a jobsite owner owes no duty to ensure compliance with WISHA regulations unless it retained control over the manner in which the work is performed); *Stute v. P.M.B.C., Inc.*, 114 Wn.2d 454, 458, 788 P.2d 545 (1990) (holding that a general contractor owes a nondelegable duty to ensure compliance with WISHA regulations for the protection of all workers on the jobsite).[10]

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visibly grounded at point of work, or where insulating barriers not a part of or an attachment to the equipment have been erected, to prevent physical contact with the lines, equipment shall be operated proximate to, under, over, by, or near energized conductors only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the equipment or load shall be ten feet.

(ii) For lines rated over 50 kV. minimum, clearance between the lines and any part of the equipment or load shall be ten feet plus 0.4 inch or each 1 kV. over 50 kV., or twice the length of the line insulator but never less than ten feet.

[9] NSM may also have violated minimum clearance requirements under the federal Occupational Safety and Health Act (OSHA) or the National Electric Safety Code (NESC). *See* CP 142-43.

[10] *See also Husfloen v. MTA Constr., Inc.*, 58 Wn. App. 686, 794 P.2d 859 (1990) (holding that a general contractor and a subcontractor who hired independent contractor owed the latter's employee a concurrent duty to ensure compliance

The Supreme Court applied this principle where Puget Power, a public utility, hired an independent contractor to perform line work (unlike CPU, which did not hire NSM). *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 635 P.2d 426 (1981). The contractor allowed its employee, Shaw, to work within two feet of an energized, high-voltage line, without protection, in violation of safety regulations. *Id.* at 276. Shaw came into contact with the line and was electrocuted. *Id.* Shaw's estate sued Puget Power, alleging it owed him a nondelegable duty to ensure compliance with safety regulations because of the "inherently dangerous" nature of the work. *Id.* The Supreme Court upheld a summary judgment of dismissal, reaffirming the longstanding rule that the employer of an independent contractor owes no duty to the contractor's employees. *Id.*, citing *Epperly v. Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965); *see also Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 802 P.2d 790 (1991).

Here, the asserted basis for a duty is far more tenuous than recognized in *Kamla* or *Stute* or argued in *Tauscher*. CPU did not employ NSM or otherwise commission its work. CPU's role was limited: it received and reviewed information regarding NSM's planned structure move and accommodated its request to move guy poles. CPU lacked authority to approve or disapprove the move. No statute, regulation, or ordinance required CPU to review or evaluate—much less supervise—the

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with safety regulations prohibiting operation of equipment within 10 feet of an energized power line).

move to ensure compliance with safety regulations. CPU provided no assurance that the move could be accomplished safely.

Even assuming CPU was aware of a practice in the structure-moving industry of having an employee ride on the roof, CPU had no duty to ensure compliance with regulations establishing minimum clearances between workers and energized lines. This conclusion is consistent with Washington's public policy choice, reflected in WISHA as interpreted in *Kamla* and *Stute*, to place the burden of ensuring compliance with safety regulations on employers and those third parties who retain control and supervisory authority over the jobsite. No basis exists to hold a third party who employed neither the employee nor the contractor, and did not commission the work, liable for the employee's injuries. *Cf. Taylor*, 111 Wn.2d at 169 ("Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments. Thus, it is more equitable to impose on such individuals the duty to ensure compliance.").

Regardless of the public duty doctrine, because CPU owed no duty to ensure compliance with safety regulations or otherwise prevent Smith from coming into contact with its lines, this Court should reverse and remand with directions to enter summary judgment in CPU's favor.

D. Even Assuming CPU Owed a Duty to Smith, as a Matter of Law There Was No Breach.

Assuming for the sake of argument that CPU owed a duty to Smith in particular, as a matter of law there was no breach. Where a duty exists,

the question of breach is ordinarily reserved for the trier of fact, but may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ripley v. Grays Harbor County*, 107 Wn. App. 575, 579, 27 P.3d 1197 (2001), citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

NSM repeatedly represented to CPU that it "measured the entire route" and its load was "below any utility wire heights." CP 823, 830, 825. CPU had no duty to verify that information. *Meaney*, 111 Wn.2d at 180. NSM did not request that any lines be disconnected, but rather assured CPU that there were "no conflicts with any [of] CPU's facilities" other than three guy poles. CPU did everything it was asked to do, including moving the guy poles. Reasonable minds could not conclude that CPU was negligent. As a matter of law, if CPU owed a duty to Smith, there was no breach.

E. Appeal against Clark County: CPU Joins in Smith's Arguments, Other Than His Argument That the Public Duty Doctrine Should Be Abolished.

1. The County Owed Smith a Duty under the Failure-to-Enforce Exception to the Public Duty Doctrine.

CPU joins in Smith's argument at pages 13-27 of his Opening Brief that Clark County was not entitled to dismissal under the public duty doctrine because Smith raised genuine issues of material fact regarding application of the failure-to-enforce exception. Smith presented evidence from which a jury could conclude the four elements of the failure-to-enforce exception are met. First, the County had a duty under Clark

County Code § 10.06A.070(c)(11) to refuse a permit to any applicant who failed to "bring proof" that the "necessary arrangements" with utility providers had been made. Second, the County possessed actual knowledge that NSM did not bring such proof. CP 360-61. Third, the County failed to take corrective action, granting permits to NSM without requiring compliance with the ordinance. *Id.* Finally, as a worker participating in the structure move that was the subject of the permit, Smith was within the ambit of the danger the ordinance is intended to protect against. *See Campbell*, 85 Wn.2d at 13 (where inspector failed to enforce code and disconnect underwater wiring that electrified creek, neighbors were within ambit of danger against which code was intended to protect).

That the incident occurred on a state road does not defeat proximate causation because the Clark County Code conferred upon the County the authority and obligation to require NSM to demonstrate having made the "necessary arrangements" for the entire route, which was entirely within Clark County. CCC § 10.06A.070(c)(11) (CP 811-12).[11]

2. The Public Duty Doctrine Should Not Be Abolished.

CPU disagrees with Smith's argument that the public duty doctrine should be abolished. Although the trial court erred in applying the public duty doctrine to dismiss Clark County, its decision was not, as Smith asserts, "akin to a finding that the County has sovereign immunity from

[11] CPU does not concede that any additional arrangements were necessary based on the loaded structure height as represented by NSM.

suit in permitting cases." *Smith's Opening Brief* at 9. Indeed, Smith concedes that the public duty doctrine "is not the same as sovereign immunity: 'The public duty doctrine does not serve to bar a suit in negligence against a government entity.' ... Rather, it is an analytical tool designed to determine if a traditional tort duty of care...is owed." *Smith's Opening Brief* at 11, quoting *Cummins*, 156 Wn.2d at 853.

Rather than conferring immunity, the public duty doctrine reflects that, notwithstanding the abolition of sovereign immunity of state and local government entities in the 1960s,[12] liability of such entities remains circumscribed by "basic principle[s]" of negligence law. *Taylor*, 111 Wn.2d at 163. One such basic principle is that a duty to the public at large, rather than to individual members of the public, is not actionable in tort. *Id.*; *see also Osborn*, 157 Wn.2d at 27-28.

Even if this Court were persuaded by Smith's criticism of the public duty doctrine, it should decline his invitation to abolish it. Although the term "public duty doctrine" was not used in Washington case law until the early 1980s, the principle underlying the doctrine had been discussed and applied in Washington cases since at least 1967 with regard to public entities. *Morgan v. State*, 71 Wn.2d 826, 828, 430 P.2d 947 (1967); *see also Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983) (citing cases). Yet neither the Supreme Court nor the legislature has abolished it. The courts presume that the legislature is aware of long-standing legal principles. *In re Det. of Hawkins*, 169

[12] RCW 4.92.090 (state); RCW 4.96.010 (local).

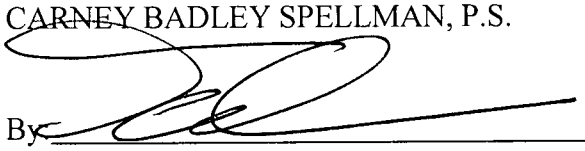
Wn.2d 796, 802, 238 P.3d 1175 (2010). This Court has previously recognized it is bound by the numerous Supreme Court decisions reaffirming the public duty doctrine and lacks authority to modify it. *Johnson v. State*, 164 Wn. App. 740, 265 P.3d 199, 207 (2011).

V. CONCLUSION

CPU owed no duty to Smith individually under any theory. CPU's duty, if any, was to the public in general and is not actionable. Regardless of the public duty doctrine, a third party who did not hire an independent contractor and who has no right or authority to supervise or control the contractor's work, and does not exercise such control, owes no duty to the contractor's employee to ensure compliance with jobsite safety regulations. Even if CPU owed Smith a duty individually, as a matter of law there was no breach. This Court should reverse and remand with directions to enter summary judgment in CPU's favor. In addition, this Court should reverse the summary judgment in favor of Clark County and remand for further proceedings.

DATED this 8th day of February, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By 

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COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

GARY SMITH Appellant/Respondent, v. CLARK PUBLIC UTILITIES, Appellant, and CLARK COUNTY, by and through the DEPARTMENT OF CLARK COUNTY PUBLIC WORKS, Respondent,	CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on the date below, I caused copies of *Appellant Clark Public Utilities' Opening Brief* and this *Certificate of Service* to be served upon counsel of record as follows:

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DATED this 8th day of February, 2012.

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